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Nos. 80-1538 and 80-1934

IN THE

Supreme Court of the United States

October Term, 1980

JAMES PLYLER, ET AL.,
Appellants,

v.

J. AND R. DOE, GUARDIAN AD LITEM FOR I. DOES, ET AL.,
Appellees.

IN RE: ALIEN CHILDREN EDUCATION LITIGATION

STATE OF TEXAS AND TEXAS EDUCATION AGENCY,
Appellants,

v.

CERTAIN NAMED AND UNNAMED UNDOCUMENTED ALIEN CHILDREN,
Appellees.

On Appeals from the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* AMERICAN JEWISH COMMITTEE

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TABLE OF CONTENTS

PAGE

Interest of the *Amicus* 2

Statement of the Case 2

The Question to Which This Brief Is Addressed 3

Argument—Exclusion of undocumented alien children from the schools of Texas pursuant to Section 21.031 of the Texas Education Code denies those children equal protection of the laws 3

Point I—The Texas statute does not serve a federal interest which would override the denial of basic constitutional rights 3

Point II—The Texas statute, unlike the school financing scheme challenged in *San Antonio ISD* v. *Rodriguez*, totally deprives children of educational opportunities 6

Point III—Because of the nature of the right involved, in conjunction with the nature of the class affected by the legislation, the Court should strictly scrutinize this legislation 9

A. Effective total exclusion from education is a denial of a fundamental interest 9

B. The statute, in punishing the children for their parents' violations of the immigration laws, affects the least culpable and most vulnerable group 10

Point IV—The State of Texas' denial of educational opportunities has severe consequences for appellees and would create unprecedented social problems if upheld by this Court 12

Conclusion 15

TABLE OF AUTHORITIES

PAGE

Cases:

Bolanos v. Kiley, 509 F.2d 1023 (2d Cir. 1975) 5

Craig v. Boren, 429 U.S. 190 (1976) 10

DeCanas v. Bica, 424 U.S. 351 (1976) 5, 6
Doe v. Plyler, 458 F. Supp. 569 (E.D. Texas 1978) 6
Douglas v. California, 372 U.S. 353 (1963) 9

Graham v. Richardson, 403 U.S. 365 (1972) 5
Griffin v. Illinois, 351 U.S. 12 (1956) 9

Holly v. Lavine, 529 F.2d 1294 (2d Cir. 1975) 5

In re Alien School Children Litigation, 501 F. Supp. 544 (1980) 9, 13

Matthews v. Diaz, 426 U.S. 67 (1976) 4, 5
Matthews v. Lucas, 427 U.S. 495 (1976) 11

San Antonio ISD v. Rodriguez, 411 U.S. 1 (1973) 6, 7, 8, 9, 10, 11, 12

Tinker v. Des Moines Community School District, 393 U.S. 503 (1969) 13
Trimble v. Gordon, 430 U.S. 762 (1977) 11

Weber v. Aetna Casualty and Surety Co., 406 U.S. 164 (1972) 11
Williams v. Williams, 328 F. Supp. 1380 (D.V.I. 1971) 5

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BRIEF OF *AMICUS CURIAE* AMERICAN JEWISH COMMITTEE

This brief is submitted with the consent of the parties.

Interest of the *Amicus*

The American Jewish Committee is a national organization which was founded in 1906 for the purpose of protecting the civil and religious rights of Jews. It has always been the conviction of this organization that the security and the constitutional rights of American Jews can best be protected by helping to preserve the security and the constitutional rights of all Americans, irrespective of race, creed, or national origin, including specifically the right to educational opportunities for all individuals.

Statement of the Case

This appeal is a consolidation of suits originally brought on behalf of school-age undocumented children challenging a statute enacted by the Texas state legislature, Section 21.031 of the Education Code. The statute provides in part:

> "(a) All children who are citizens of the United States or legally admitted aliens and who are over the age of five years and under the age of 21 years on the first day of September of any scholastic year shall be entitled to the benefits of the available School Fund of that year.
>
> (b) Every child in this state who is a citizen of the United States or a legally admitted alien and who is the age of five years and not over the age of 21 years on the first day of September of the year in which admission is sought shall be permitted to attend the public free schools of the district in which he resides or in which his parent . . . resides at the time he applies for admission."

The impact of the legislation is to deny reimbursement to local school districts for the education of undocumented children. The school districts are permitted to charge children tuition or exclude them from school.

The Question to Which This Brief Is Addressed

This brief is addressed to the single question of whether the exclusion of undocumented children from the schools of the State of Texas pursuant to Section 21.031 of the Texas Education Code denies these children the equal protection of the laws in violation of the Fourteenth Amendment of the United States Constitution.

ARGUMENT

Exclusion of undocumented alien children from the schools of Texas pursuant to Section 21.031 of the Texas Education Code denies those children equal protection of the laws.

POINT I

The Texas statute does not serve a federal interest which would override the denial of basic constitutional rights.

Persons residing within the United States illegally can, for certain purposes, be treated differently from citizens and legal aliens, both by the federal and state governments.

As appellants assert, federal regulations currently prohibit states from providing undocumented aliens with cer-

tain federal benefits, including food stamps, Aid to Families with Dependent Children, and also restrict aliens' entitlement to Medicare and Medicaid. However, federal education legislation does not exclude undocumented children from coverage. Both the Elementary and Secondary Act of 1965 and the Education of the Handicapped Act provide for coverage of all children residing within the United States.

The broad Congressional power over immigration has been used to explain the disparity in treatment between aliens, even those residing in the United States legally, and citizens:

> "In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens. The exclusion of aliens and the reservation of the power to deport have no permissible counterpart in the Federal government's power to regulate the conduct of its own citizenry. The fact that an Act of Congress treats aliens differently from citizens does not imply that such disparate treatment is 'invidious.' "

Matthews v. *Diaz*, 426 U.S. 67, 79-80 (1976).

Because this broad power is in part of a political nature, courts have not required that distinction between citizens and aliens in federal legislation be precisely tailored to the exercise of the power to regulate immigration and naturalization. For example, in *Matthews* v. *Diaz, supra,* this Court upheld the denial of Medicare eligibility to aliens legally residing in the United States for less than five years. The Court reasoned that the Medicare statute was consistent with federal immigration policy, and so did not strictly scrutinize the legislation.

Nevertheless, despite the broad federal power over immigration, courts have not always deferred to legislative judgment on these matters. For it is clear that aliens, even illegal aliens, do have certain basic constitutional rights and the standing to assert them. *Bolanos* v. *Kiley*, 509 F. 2d 1023 (2d Cir. 1975); *Williams* v. *Williams*, 328 F. Supp. 1380 (D.V.I. 1971); *Holly* v. *Lavine*, 529 F.2d 1294 (2d Cir. 1975).

The extent of deferral to legislative judgments depends on the interest involved and whether a federal or a state law is challenged. Denials of basic constitutional rights to aliens have been struck down by the courts, but denials of entitlements to government programs have generally been upheld. Also, courts have been more reluctant to defer to the judgment of state legislatures than to the United States Congress. For example, in *Matthews* v. *Diaz*, *supra*, the federal Medicare eligibility residence requirement was upheld while in *Graham* v. *Richardson*, 403 U.S. 365 (1972), this Court struck down a similar state residency requirement.

Amicus argues that because of the nature of the right involved—education—and because the statute challenged serves no federal objective, this Court should not defer to the Texas legislature's judgment.

On this point we believe that the case at bar can be distinguished from *DeCanas* v. *Bica*, 424 U.S. 351 (1976), in which this Court ruled constitutional a California statute prohibiting the knowing employment of illegal aliens when such knowing employment would disadvantage employment of lawful residents. As the District Court persuasively

argued in *Doe* v. *Plyler*, 458 F. Supp. 569 (1978), in *DeCanas* the California law prohibiting the employment of illegal aliens was consistent with the federal scheme enacted in the Immigration and Nationality Act of 1952, which contains a labor certification program designed to protect the United States labor market from the influx of both skilled and unskilled foreign labor. But *amicus* argues, as did the District Court, that "By contrast the Texas statute at issue in the instant case is neither intended to nor does in fact, implement any express or apparent federal objective. The state does not attempt to justify section 21.031 as an effort to exclude aliens whom Congress has chosen to exclude, nor could such justification be taken seriously." 458 F. Supp. at 585.

POINT II

The Texas statute, unlike the school financing scheme challenged in *San Antonio ISD* v. *Rodriguez*, totally deprives children of educational opportunities.

The question presented by *San Antonio ISD* v. *Rodriguez*, 411 U.S. 1 (1973) was whether the Texas dual system of financing public education, which in part based the funds available to a local school district on the property tax base of the district, violated the Equal Protection Clause of the 14th Amendment. But, while *Rodriguez* bears a superficial resemblance to the case at bar, we urge that its holding be confined to the peculiar set of facts presented by that case.

Rodriguez is often cited for the proposition that education is not a "fundamental right" to which this Court has

afforded strict judicial scrutiny. But, *Rodriguez* was primarily concerned with "threshold" questions. Therefore strict scrutiny, whether applicable in cases involving deprivation of education or not, was simply never triggered in the case:

> "This approach [of the lower courts] largely ignores the hard threshold questions, including whether it makes a difference for the purpose of consideration under the Constitution that the class of disadvantaged 'poor' cannot be identified or defined in customary equal protection terms, and whether the relative—rather than the absolute—nature of the asserted deprivation is of significant consequence. Before a State's laws and justifications for the classifications they create are subject to strict scrutiny, we think the threshold questions must be analyzed more closely than they were in the court below." 411 U.S. at 18.

This Court deferred to the Texas legislature's wisdom on school financing, and refused to hold that the Texas dual system of school financing violated the Equal Protection Clause because: (1) the claim was speculative, for the disparity in per capita funds available to school districts having low property tax bases compared to those with higher tax bases would not necessarily affect the quality of education received. (2) Even if it could be proven that the quality of education directly correlated with per capita education expenditures "the Equal Protection Clause does not require absolute equality or precisely equal advantages," that is, any deprivation of rights involved was not absolute, but merely relative. In addition, the charge that the class allegedly discriminated against was the "poor" was not demonstrated since all poor children did not reside

in school districts with low property tax bases, or all wealthier children in districts with higher tax bases (411 U.S. at 22).

Amicus respectfully argues that the case at bar is much more clearcut than *Rodriguez,* is more amenable to judicial resolution, and also presents a far more compelling need for intervention by this Court. Here the inability of the parents of undocumented children to pay $1,000 effectively precludes the children from receiving a public education.

Indeed, in *Rodriguez* Justice Powell explicitly reserved for decision a situation like that presented by this case:

> "If elementary and secondary education were made available by the State only to those able to pay a tuition assessed against each pupil, there would be a clearly defined class of 'poor' people—definable in terms of their inability to pay the prescribed sum—who would be absolutely precluded from receiving an education. That case would present a far more compelling set of circumstances for judicial assistance than the case before us today." 411 U.S. at 25, footnote 60.

Several of the difficulties this Court was faced with in *Rodriguez* are not present in this case: The class affected by the legislation is discrete, not amorphous—undocumented school-age children residing within the State of Texas. Second, there is no doubt that an equal protection analysis is triggered because the parents of these children are completely unable to pay for a public education, and as a result, the children are absolutely denied educational opportunities by the state. For this reason this case is more analogous to prior cases in which this Court has struck down state laws

conditioning the exercise of constitutional rights on the ability to pay for the desired benefit, such as *Griffin* v. *Illinois*, 351 U.S. 12 (1956) (invalidating state laws requiring a fee for obtaining a transcript on appeal), and *Douglas* v. *California*, 372 U.S. 353 (1963) (establishing indigents' right to court-appointed counsel on direct appeal), than to *Rodriguez*. Third, the fear that resolution of the case in favor of appellees would occasion in Texas and elsewhere an unprecedented "upheaval in public education" is not present. 411 U.S. at 56.

POINT III

Because of the nature of the right involved, in conjunction with the nature of the class affected by the legislation, the Court should strictly scrutinize this legislation.

A. Effective total exclusion from education is a denial of a fundamental interest.

As Judge Seals said in the *In re Alien Children Education Litigation*, 501 F. Supp. 544 (1980), "This case concerns what has evolved into the most important institution in this country: the public school. Our public schools no longer exist merely to supply the tools which provide access to the economic bounty and participatory process of this nation. With the decline of influence possessed by other institutions in our society such as the family and the church, the schools are being called on to perform additional functions. Public school teachers are being required to perpetuate our culture and to provide a moral compass for our children." 501 F. Supp. at 549.

While this Court has never held education to be a fundadamental interest, neither has it ruled on a state's total deprivation of educational opportunities to school-age children within its borders. Indeed, in *Rodriguez* this Court said "nothing this Court holds today in any way detracts from our historic dedication to public education. We are in complete agreement with the conclusion of the three-judge panel that 'the grave significance of education both to the individual and to our society cannot be doubted.' "

Because of the vital importance of public education to the American Republic, *amicus* urges this Court to address the question left open by *Rodriguez* and to hold that an absolute denial of educational opportunities by a state to children living within its borders denies them of a fundamental interest.

But, in the alternative, even if the Court is reluctant to apply strict scrutiny to the Texas law, a total denial of educational opportunities would require an application of an intermediate standard of scrutiny such as that used in classifications by gender, which "must serve important governmental objectives and must be substantially related to the achievement of those objectives." *Craig* v. *Boren*, 429 U.S. 190, 198 (1976).

B. The statute, in punishing the children for their parents' violations of the immigration laws, affects the least culpable and most vulnerable group.

Amicus urges that the classification set up by the Texas law in effect punishes the children for a status over which they have no control, and that the reasons for applying a strict standard of judicial scrutiny to classifications such

as race and illegitimacy, namely that judicial protection is necessary because the class is saddled with disabilities and is in a condition of political powerlessness is present in this case. *San Antonio ISD* v. *Rodriguez*, 411 U.S. 1, 28.

This Court has established, in the cases involving illegitimate children, that the imposition of legal disabilities on a child for an act of his parents is contrary to the basic tenet of our legal system that legal burdens should bear some relationship to individual responsibility or wrongdoing. *Matthews* v. *Lucas*, 427 U.S. 495, 505 (1976). The Texas statutes denies children access to a free education solely on the basis of their immigration status which is totally outside their control. In cases involving the rights of illegitimate children this Court has observed that parents have the ability to conform their conduct but that children can affect neither their parents' status nor their own status. *Trimble* v. *Gordon*, 430 U.S. 762, 770 (1977).

The inability of undocumented alien children to control their own destiny clearly distinguishes the nature of their constitutional rights from those of other persons, including their parents. As this Court remarked in *Weber* v. *Aetna Casualty and Surety Co.*, 406 U.S. 164 (1972), which held unconstitutional a Louisiana workers compensation statute that denied recovery by illegitimate children for their father's death: ". . . visiting this condemnation on the head of the infant is illogical and unjust."

The same rationale this Court used in *Weber* is applicable to the present case. While the purpose of the law in *Weber*—to save state funds and to discourage birth outside

wedlock was permissible, the means of achieving these goals, namely, denying the child death benefits, was not. Similarly, in this case, while the Texas statute's purpose of saving funds is legitimate, denying a child, through no fault of his own, a public education, is unreasonable and arbitrary. In providing for a free public education for children of elementary and secondary school age, the State of Texas has established a statutory right. The state should not be permitted to discriminate against some children on the basis of the actions of their parents.

POINT IV

The State of Texas' denial of educational opportunities has severe consequences for appellees and would create unprecedented social problems if upheld by this Court.

In *San Antonio School District* v. *Rodriguez,* this Court said, "It cannot be questioned that the constitutional judgment of the District Court and approved by our dissenting Brothers today would occasion in Texas and elsewhere unprecedented upheaval in public education." 411 U.S. at 56. *Amicus* respectfully urges that a decision of this Court upholding Section 21.031 and thereby permitting other states to pass laws requiring parents of undocumented children to pay substantial sums for their children's public education would create unprecedented social problems.

While the number of illegal residents within the United States remains uncertain [Report of the Comptroller General to the Congress of the U.S., April 1981], the best estimates place the number from three to six million. While

only about 3% of illegal immigrants are estimated to have children in the schools, since most undocumented aliens tend to be young single men in search of employment, it is nevertheless evident that, were states such as New York and California with large populations of undocumented workers to pass laws similar to Section 21.031, thousands of children would be denied an education altogether, thus creating what would in effect be an illiterate "underclass" of persons living within the United States.

As Judge Seals said in the *In Re Alien Children Education Litigation*:

> ". . . it is impossible to perceive the impact of the creation of a permanent underclass of persons who will live their lives in this country without being able to participate in our society.
>
> . . . The public school has been a mechanism to assimilate immigrants into our society. Uneducated children who eventually will be admitted into this country, will never be admitted into the society." 501 F. Supp. at 562.

The American Jewish Committee is deeply concerned about the impact of legislation such as this. We believe that denying children living within the United States borders access to a free public education would introduce a bleak chapter into American history. The American Jewish Committee has, since its founding in 1906, been a strong supporter of public education. We see it as vital to preserving American pluralism, which for Jews and other minorities, is a central feature of American life. Or, as Justice Fortas said in *Tinker* v. *Des Moines Community School District*:

> "The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues rather than through an authoritative selection." 393 U.S. at 512.

As an organization whose members are the sons and daughters of immigrants, the American Jewish Committee recognizes that, to a large extent, free public education made possible the economic and social advances of American Jews and other ethnic groups in the 20th Century. While we recognize that a serious problem has arisen because many more immigrants have been entering the country outside the legal process than enter through legal means, and other who enter lawfully as visitors overstay their visas and remain unlawfully, we urge that the public schools of this country are not the proper place to address this problem. Whether or not these children are granted access to the public schools, most of them will stay in the United States. And, sadly, they will become the first generation of American immigrants unable to read and write, probably unable to speak English, and not able to fully participate in our society.

Conclusion

For the foregoing reasons, the decisions below should be affirmed.

Respectfully submitted,

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